

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

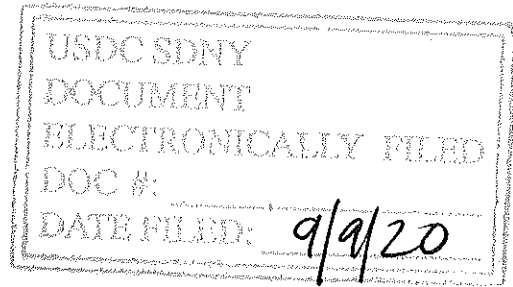
-----X
MARTINEZ,

Petitioner,

-against-

TOMES,

Respondent.
-----X



**ORDER
GRANTING STAY**

19 Civ. 7651 (KMK) (PED)

Petitioner seeks a stay of this action pending resolution of a § 440.10 motion he has filed in the trial court. (Dkt. 14.) The Court directed Respondent to submit any reply to Petitioner's request by June 5, 2020. (Dkt. 15) No reply or opposition has been received.

A court may stay a "mixed" petition that contains both exhausted and unexhausted claims if: (1) good cause exists for the petitioner's failure to exhaust his claims in state court; (2) the unexhausted claims are not "plainly meritless;" and (3) the petitioner has not engaged in "intentionally dilatory litigation tactics." Rhines v. Weber, 544 U.S. 269, 277–78 (2005). Good cause exists here because Petitioner timely submitted this request in order to protect his unexhausted claim and is seeking, without delay, to exhaust the claim in state court. See Pierre v. Ercole, 607 F. Supp. 2d 605, 608 (S.D.N.Y. 2009). In addition, the Court cannot conclude as of now that Petitioner's unexhausted claim is so plainly without merit that a stay should be denied. Finally, there is no evidence to indicate that Petitioner has engaged in intentionally dilatory litigation tactics.

Accordingly, Petitioner's unopposed motion for a stay is **GRANTED**. These proceedings are stayed pending resolution of Petitioner's § 440.10 motion (including any available appellate review.) Upon resolution of that motion, Petitioner must move, within thirty

(30) days, to lift the stay and reopen this case for further proceedings. See Zarvela v. Artuz, 254 F.3d 374, 381–82 (2d Cir. 2001). Petitioner is hereby notified that, if he does not comply with this condition of the stay, the Court may vacate the stay *nunc pro tunc* as of the date the stay was entered and may dismiss his *habeas* petition. See id. Petitioner is also advised that he must prepare and file an amended petition setting forth all of his claims, including those raised in his § 440.10 motion, within thirty (30) days after his state court remedies have been exhausted.

Dated: September 9, 2020
White Plains, New York

SO ORDERED



PAUL E. DAVISON, U.S.M.J.

Chambers has mailed a copy of this Order to:

Miguel Martinez
Five Points Correctional Facility
Caller Box 119
Romulus, NY 14541